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7 CALVARY CHAPEL SAN JOSE, et al.,
8 Plaintiffs,
9 v.
10 SARA CODY, et al.,
11 Defendants.

Case No. 20-cv-03794-BLF

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**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

26 This case involves the intersection of the religious freedom of some and the public health
27 of all. Plaintiffs Calvary Chapel San Jose, Southridge Baptist Church of San Jose California d/b/a
28 Southridge Church, Mike McClure, and Micaiah Irmler (collectively “Plaintiffs”), are suing
certain Santa Clara County officials in their official capacities—Dr. Sara Cody, Santa Clara
County Public Health Officer, and the individuals who serve as Santa Clara County Supervisors:
Mike Wasserman, Cindy Chavez, Dave Cortese, Susan Ellenber, and Joe Simitian—for violating
their First Amendment and state constitutional religious freedom rights and state constitutional
right to privacy with a County public health order aimed at stopping the spread of the COVID-19
pandemic. *See* Compl., ECF 1. Defendants have filed a motion to dismiss all claims on several
grounds. *See* Mot., ECF 20. Plaintiffs filed a brief in opposition, *see* Opp’n, ECF 21. At the
November 5, 2020 oral argument, Plaintiffs indicated that they plan to file an amended complaint
substantially revising the existing claims and adding additional claims. Defendants do not oppose
Plaintiffs seeking leave to amend.

26 Accordingly, as stated on the record, the Court GRANTS Defendants’ motion to dismiss.
27 Claims against the County Supervisors are dismissed WITHOUT LEAVE to amend, as Plaintiffs
28 have failed to plead facts establishing that the County Supervisors have a role in drafting the

1 public health orders or enforcing them, and Plaintiffs have not shown that they could add such
2 facts by further amendment. All claims against Defendant Cody are dismissed WITH LEAVE to
3 amend. The dismissal of the County Supervisors is without prejudice to adding additional claims
4 against them in the amended complaint. This written order memorializes the ruling.

5 **A. Constitutional Religious Freedom Claims**

6 Plaintiffs bring claims against the County's Stay-at-home order ("County Order") that was
7 signed by Defendant Cody and effective as of June 5, 2020, for violating their right to free
8 exercise of religion under both the First Amendment of the U.S. Constitution and Art. 1, sec. 4 of
9 the California Constitution, and the Establishment Clause of the First Amendment of the U.S.
10 Constitution. Compl. ¶¶ 92-144. Defendants move to dismiss the free exercise claims under
11 *Jacobson v. Massachusetts*, which holds that when a state or locality exercises emergency police
12 powers to enact an emergency public health measure, courts will uphold it unless (1) there is no
13 real or substantial relation to public health, or (2) the measures are "beyond all question, a plain,
14 palpable invasion of rights secured by the fundamental law" 197 U.S. 11, 31 (1905); Mot. 13-16.
15 Defendants move to dismiss the establishment clause claim under test set forth in *Lemon v.*
16 *Kurtzman*, 403 U.S. 602 (1971). Mot. 20-21. Under *Lemon*, a government act is consistent with
17 the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that
18 neither advances nor disapproves of religion; and (3) does not foster excessive governmental
19 entanglement with religion. *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1255 (9th Cir. 2007)
20 (citing *Lemon*, 403 U.S. at 612-13). Plaintiffs argue that the *Jacobson* standard does not apply in
21 this instance and that the County Order is not neutral and generally applicable and is not narrowly
22 tailored to serve the government's interest in health and safety. Opp'n 6-19.

23 The Supreme Court recently invoked the *Jacobson* standard when denying an application
24 for injunctive relief against California Governor Gavin Newsom's executive order aimed to limit
25 the spread of COVID-19. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).
26 "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically
27 accountable officials of the States 'to guard and protect.'" *Id.* at 1613 (Roberts, C.J., concurring)
28 (citing *Jacobson*, 197 U.S. at 38). "When those officials 'undertake[] to act in areas fraught with

1 medical and scientific uncertainties,’ their latitude ‘must be especially broad.’” *S. Bay United*
2 *Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (citing *Marshall v. United*
3 *States*, 414 U.S. 417, 427 (1974)). Here, Plaintiffs have failed to plead any facts demonstrating
4 that the County Order lacks a substantial relation to public health or is “beyond all question a plain
5 and palpable invasion of rights secured by the fundamental law.”

6 Similarly, with the establishment clause claim and the *Lemon* test, Plaintiffs have failed to
7 allege facts showing that the County Order does not have a secular purpose, a principal or
8 primary effect that neither advances nor disapproves of religion, or does not foster excessive
9 government entanglement with religion. Accordingly, these claims are DISMISSED WITHOUT
10 PREJUDICE.

11 **B. Privacy Claim**

12 Plaintiffs argue that the portion of the County Order that mandates Plaintiffs record “names
13 and contact information” of all people that attend religious services and use that information to
14 “assist the County Public Health Department in any case investigation and contact tracing”
15 violates their right to privacy. Compl. ¶¶ 145-151. Defendants move to dismiss the claim because
16 Plaintiffs lack standing. Mot. 22-23. Specifically, Plaintiffs fail to plead what privacy interest is
17 allegedly being invaded by asking a gathering host to collect attendee contact information—“The
18 Complaint states only that the contact-tracing provision and the ‘enforcement’ thereof ‘implicate
19 Plaintiffs’ legally protected privacy interest’ ([Compl.] at ¶ 145), but that allegation does not
20 establish an injury in fact to these Plaintiffs.” Mot. 22. Plaintiffs further develop their theory on
21 this claim in their opposition brief, *see* Opp’n 19-21, but those theories are not found in the
22 complaint. The Court agrees with Defendants that Plaintiffs have failed, at this point, to
23 adequately plead a privacy interest that has been invaded, and therefore they lack standing to
24 pursue this claim. Accordingly, the Court will DISMISS this claim WITHOUT PREJUDICE.

25 **C. Conclusion**

26 Plaintiffs claims against the County Supervisors are DISMISSED WITH PREJUDICE.
27 The remaining claims are DISMISSED WITHOUT PREJUDICE. As discussed at the hearing,
28 Plaintiffs have until December 11, 2020, to amend their complaint. The parties are to file a joint

1 statement and copy of any orders issued in the parallel state proceedings involving the parties.

2 **IT IS SO ORDERED.**

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4 Dated: November 5, 2020



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6 BETH LABSON FREEMAN
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8 United States District Judge

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11 United States District Court
12 Northern District of California
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